PUBLIC PROSECUTOR

v.

PENGURUS, RICH FOOD PRODUCTS SDN. BHD.

HIGH COURT MALAYA, JOHOR BAHRU
MOHD. YUSOFF MOHAMED J
[CRIMINAL APPEAL NO. 12 OF 1981]
3 MAY 1981

CRIMINAL PROCEDURE: *Charge under s. 11(1)(b) of the Sale of Food and Drugs Ordinance 1952 - Whether defence available under s. 21 - Not strict liability offence - Question of fact determined by the Magistrate.*

The Public Prosecutor appealed against the acquittal of the respondent on a charge under s. 11 (1)(b) of the Sale of Food and Drugs Ordinance 1952 for selling fish floss with label attached there-to not describing the contents which included among others, 1.7 parts per million of mercury, punishable under s. 11(4) of the Ordinance.

The fish floss was sent to the chemist whose report showed that the fish floss besides containing sugar, salt, bean sauce, vegetable oil, essence of taste as described in the label, also contained 1.7 parts permillion of mercury.

The chemist who was called to testify on behalf of the defence said that the high content of mercury came from the fish and not from the ingredients used by the respondent. He was also of the opinion that for the purpose of manufacturing fish floss, mercury had no useful function and that the mercury must be deliberately introduced for the fish floss to contain the high percentage of mercury found.

The respondent testified that she had bought the fish for the purpose of manufacturing the said floss from the open market as well as all the ingredients used in the manufacture.

Held:

[1] This was not a strict liability offence and whether there is a defence open to the respondent under s. 21 of the Ordinance is a question of fact to be decided by the Magistrate.

[2] The learned Magistrate has found as a fact that the respondent had taken all reasonable steps in ascertaining that the manufacture of the fish floss did not contain mercury as found after analysis.

[3] The respondent had not acted wilfully and that it was not reasonable to impose on a small scale industrialist, as the respondent, to employ a chemist to analyse the food she manufactured.

[The appeal was dismissed.]

Legislation referred to:
Sale of Food and Drugs Ordinance 1952, ss. 11(1)(b), (4), 21

For the appellant - John O'Hara, DPP
For the respondent - Lai Poh Fye; Jackson & Masacorale

JUDGMENT

Mohd. Yusoff Mohamed J:

This is an appeal by the Public Prosecutor against acquittal of the respondent Khor Get Kee, Pengurus, Rich Food Products Sdn. Bhd., Johore Bahru on a charge under s. 11(1)(b) of the Sale of Food and Drugs Ordinance 1952, for selling fish floss with label attached thereto not describing the contents which included among others, 1.7 parts per million of mercury punishable under s. 11(4) of the Ordinance.

The facts show that the Inspector of Sale of Food and Drugs, Johore Bahru had taken possession of 6 packets of pure fish floss from a shopkeeper in the town on 12 January 1980. In compliance with the Ordinance, he sent the fish floss to the Chemist for analysis. The chemist's report shows that the fish floss, besides containing sugar, salt, bean sauce, vegetable oil, essence of taste as described in the label, also contains 1.7 parts per million of mercury. The prosecution relied on the chemist's report when prosecuting the respondent.

The respondent in her defence called the chemist to testify on her behalf, who in his evidence said that he had examined all the ingredients used in manufacture of the said fish floss and he found that all the ingredients used by the respondent did not contain mercury. In his opinion, the high content of mercury found in the floss came from the fish and not the other ingredients used in their natural state. He was also of the opinion that for the purpose of manufacturing fish floss, mercury has no useful function. He also said emphatically that unless mercury was deliberately introduced into the manufacture of fish floss, it cannot contain the high percentage of mercury as found in the floss.

The respondent said that she had bought the fish for the purpose of manufacturing the said floss as the well as all the ingredients used in its manufacture from the open market.

Section 21 of Sale of Food and Drugs Ordinance that provides a defence in that:

> ... it shall be no defence, that the defendant (respondent) did not act wilfully unless he also proves that he took all reasonable steps in ascertaining that the sale of the article would not constitute an offence against this Ordinance ...

This is not a strict liability offence and whether there is a defence open to the respondent under s. 21 of the Ordinance is a question of fact to be decided by the Magistrate.

The learned Magistrate has found as a fact that the respondent had taken all reasonable steps in ascertaining that the manufacture of the fish floss did not contain mercury as found after analysis. This was a home industry manufacturing the floss on a small scale for distribution locally. The learned Magistrate also found that the respondent did not act wilfully and that it was not reasonable to impose on a small scale industrialist as the respondent, to employ a chemist to analyse the food she produced before marketing them.

I see no reason to interfere with the finding of facts by the learned Magistrate and therefore dismiss this appeal.

Also found at [1981] CLJ 92